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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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# No. 169

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PENNSYLVANIA PUBLIC UTILITY COMMISSION,
*Petitioner,*

*vs.*

CHELTENHAM & ABINGTON SEWERAGE COMPANY.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, BRIEF IN SUPPORT THEREOF AND MOTION AS TO RECORD.

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# SUPREME COURT OF THE UNITED STATES

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## No.

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PENNSYLVANIA PUBLIC UTILITY COMMISSION,
*Petitioner*

*v.*

CHELTENHAM & ABINGTON SEWERAGE COMPANY,
*Respondent*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petitioner, Pennsylvania Public Utility Commission, respectfully prays that a Writ of Certiorari issue herein to review a certain final decision of the Supreme Court of Pennsylvania which is the highest Court of Appeal in the said State. The decision of the State Supreme Court was rendered on March 23, 1942.

## Summary of Matter Involved.

This case challenges the power of the Pennsylvania Public Utility Commission to hold Cheltenham and Abington Sewerage Company, a utility rendering sewerage service for compensation to the public within Pennsylvania, liable for the payment of reparations for collecting rates which were contained in a tariff approved by the Commission, but which produced, to the certain knowledge of the utility, an over-all gross annual revenue in excess of that previously prescribed by the Commission.

On October 6, 1930, The Public Service Commission of the Commonwealth of Pennsylvania, predecessor of petitioner, issued an order whereby it directed that the rates of respondent be reduced to provide a gross annual revenue not in excess of $36,140.00. A tariff designed to yield such revenue was duly filed and became effective July 1, 1931, with the approval of the Commission.

In August, 1933, the Commission instituted informal conferences with representatives of respondent seeking reductions of rates after an investigation of respondent's books indicated that respondent was collecting annual amounts in excess of those permitted by the Commission.

After informal negotiations had failed to secure a rate decrease, the Commission, on December 11, 1934, instituted formal proceedings to determine the reasonableness of respondent's rates and subsequently, on August 30, 1935, an order was entered reducing the allowable gross annual revenue to $27,700.00. An appeal from this order was taken to the Superior Court of Pennsylvania, which increased the annual allowance to $30,050.00. Respondent thereafter filed a tariff effective January 1, 1937, complying with the Superior Court order. Charges for the entire period, July 1, 1931 to January 1, 1937, were in accordance with the terms of the tariff effective July 1, 1931.

In the meantime, on October 17, 1935, certain of respondent's consumers filed with the Commission a reparation peti-

tion for damages allegedly sustained by reason of the collection of the rates contained in the tariff of respondent effective July 1, 1931. On September 23, 1940, your petitioner issued its order finding that respondent was liable for the payment of reparations for the period from October 17, 1933 to January 1, 1937. An appeal was thereupon taken by respondent to the Superior Court of Pennsylvania which held that respondent had no liability for reparations on collections of rates prior to December 11, 1934, the date upon which the Commission instituted its formal rate proceeding against respondent. This decree was appealed by respondent to the Supreme Court of Pennsylvania and, on March 23, 1942, that Court rendered the decision review of which is sought by this petition.

The opinion of the Pennsylvania Supreme Court affirmed the decree of the Superior Court with the modification that August 30, 1935, the date of the Commission order establishing final rates, was fixed as the earliest date from which respondent could be liable for reparations. The Pennsylvania Supreme Court decided that the rates contained in a tariff which was approved by the Commission, were the lawful and reasonable rates upon which the utility was entitled to rely until duly changed by Commission order. This decision constitutes a holding that the utility may knowingly disregard the limitations placed by the Commission upon the amount of gross annual revenue. Any attempt to award reparations for collections in excess of the allowable gross annual revenue but in accordance with the filed tariff of the utility was held to amount to confiscation of the utility's property. The Pennsylvania Supreme Court's decision was based chiefly upon the authority of a decision of this Court, namely: **Arizona Grocery Co. v. Atchison, Topeka & S. F. Railway Co., 284 U. S. 370 (1932).**

## Jurisdiction.

The decision of the Supreme Court of Pennsylvania sought to be here reviewed was entered March 23, 1942, and is reported at 344 Pa. 366 and 22 A(2d) 37. The record is pres-

ently in the possession of the Clerk of this Court by reason of an appeal taken by respondent from the decision of the Supreme Court of Pennsylvania. Jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended, which provides as follows: (27 U. S. C. A. 344)

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Respondent before the Commission and the Courts below raised the Federal question that its property had been taken without due process of law in that it had been held liable for the payment of reparations. This issue was decided in respondent's favor and against petitioner by the Supreme Court of Pennsylvania, in so far as liability for reparations during the period December 11, 1934, to August 30, 1935, is concerned.

## Statutes Involved.

The Statute of the Commonwealth of Pennsylvania which is here involved, is the Act of July 26, 1913, P. L. 1374, as amended by the Act of Assembly of July 12, 1931, P. L. 530 (66 Purdon's Penna. Statutes l f. f.), the pertinent provisions of which are set out as follows:

Article V, Section 3, of the Act of July 26, 1913, P. L. 1374 (66 Purdon's Penna. Statutes 492):

> "Whenever the commission shall determine, after hearing, had upon its own motion, or upon complaint, that the rates, fares, tolls, or charges established, demanded, exacted, charged, or collected by any public service company or companies, for any service rendered or furnished, are unjust or unreasonable or inadequate, or are unjustly discriminatory or unduly or unreasonably preferential; or that the facilities or service furnished or rendered by any public service company or companies are unjustly discriminatory, or unduly or unreasonably preferential; in favor of or against any particular person, corporation, locality, or any particular kind or description of traffic or service,—then the commission shall determine, and prescribe by a specific order, the maximum, just, due, equal, and reasonable rates, fares, tolls, and charges to be thereafter established, demanded, exacted, charged, or collected for the service to be performed; and the just, due, equal, reasonable, and proper regulations and practices, as affecting such rates, to be observed by the public service company; and the commission may classify such rates. The said order shall be served, as hereinafter provided, upon all public service companies by which such rates, fares, tolls, and charges, and such regulations and practices affecting the same, are thereafter to be charged and observed. The power to fix maximum rates or charges shall include the power to fix joint rates or charges where joint service is rendered by two or more public service companies, or where other public service companies may be interested in the rate or charge."

Article V, Section 5, of the Act of July 26, 1913, P. L. 1374 (66 Purdon's Penna. Statutes 511):

> "If, after hearing, upon complaint or upon its own motion, the Commission shall determine that any rates which have been collected * * * were in violation of any order of the Commission, or were unjust or unreasonable or unjustly discriminatory or unduly or unreasonably preferential; or, in like manner, shall find that the rates so collected are in excess of the rates contained in the tariffs or schedules of any such public service company * * * the Commission shall * * * have the power and authority to make an order for reparation * * *
>
> "No reparation, as herein provided, shall be awarded by the commission unless the complaint or petition shall have been filed with it within two years from the time authority to make an order for reparation * * *.

## Question Presented.

Where a sewage utility knowingly collects rates which, although in accordance with a tariff approved by a regulatory commission, produced gross annual collections in excess of those permitted by prior Commission order, is it violative of the due process clause of the Federal Constitution for the Commission to hold the utility liable for reparations with regard to the portion of such collections made prior to a Commission order directing the filing of a new tariff?

## Reasons Relied Upon For Writ of Certiorari.

This Court has never passed upon the question of whether a utility can rely upon a tariff prepared by it and approved by the Commission after it has certain knowledge that the annual collections made in accordance with the provisions of the said tariff are in excess of allowable annual gross revenues prescribed by prior Commission order.

The decision of this Court in **Arizona Grocery Co. v Atchison T. & S. F. Railway Co., 284 U. S. 370,** which the Supreme Court of Pennsylvania considered controlling

here, and which is the only Federal decision cited in the opinion of that Court, did not involve a Commission determination of the permissible annual gross revenues of the utility. It involved solely a Commission determination and prescription of specific railroad freight rates for the transportation of certain commodities between specific points and the right of the utility to rely thereupon. The instant case presents a new question, namely, whether in cases where the Commission sets the maximum annual revenue level the utility can escape reparations for excess knowingly collected upon the sole ground that the Commission had approved the tariff under which the excess collections were made.

The establishment of the rates of a utility often requires two steps, one of which must precede the other. The first is determination of the maximum allowable revenues. This step is taken only after full hearing and mature consideration of all facts relating to the utility property and business. The second is the establishment of a rate schedule providing for such revenues. This step involves preparation of tariffs by the utility and approval thereof by the Commission. Such approval necessarily can be only tentative and based upon estimates projected into the future. It cannot be supported by experience data. Under the decision of the Supreme Court of Pennsylvania, the latter step is held to a legislative act upon which the utility is entitled to rely, although this holding practically nullifies the effect of the Commission determination of the proper revenue level. It will be of great importance both to the parties here involved and to the utility consuming public in Pennsylvania in general to have a decision as to whether or not a utility is relieved of the duty of compliance with a Commission order prescribing permissible maximum revenue level, by virtue of the fact that the Commission has approved a rate schedule apparently designed, to comply with the prior rate order. Such a decision will definitely inform both the utility and the Commission as to their duties with respect to keeping the utility charges currently reasonable and will inform the consuming public as to the exact amount of protection which may be expected against the exaction of excessive rates.

## Conclusion

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, requiring that Court to certify the whole record of the case herein to this court for its review and determination.

Respectfully submitted,

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